

STATE OF MICHIGAN  
COURT OF APPEALS

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NEW MICHIGAN, L.P.,

Petitioner-Appellant,

v

CITY OF NORTON SHORES,

Respondent-Appellee.

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UNPUBLISHED

March 3, 2011

No. 294678

Michigan Tax Tribunal

LC No. 00-326490

Before: MURPHY, C.J., and WHITBECK and MURRAY, JJ.

PER CURIAM.

Petitioner New Michigan, L.P., appeals as of right from the opinion and judgment of the Michigan Tax Tribunal determining the true cash values, state equalized values, and taxable values of real property in the city of Norton Shores for tax years 2006 and 2007. We affirm.

This is the companion case to the case involving the Lakecrest Park apartment building. This Court decided that appeal in favor of the taxing authority in that case, *Roosevelt Park*. See *New Michigan, LP v Roosevelt Park*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 2011 (Docket No. 294174). To the extent the facts in this case differ from those in the *Roosevelt Park* case, this will be dealt with in the analysis section of the opinion. For current purposes, we simply note that Lakecrest Shores apartments are located in Norton Shores, while Lakecrest Park apartments are located in Roosevelt Park.

As petitioner recognized at oral argument before this Court, the dispositive issue in this case is the same as that in *Roosevelt Park*, i.e., whether the Tax Tribunal properly rejected petitioner's unitary approach to determining value. Specifically, petitioner asserts that the Tax Tribunal should have given weight to how the properties actually operate, and that its appraiser provided a well-reasoned basis for combining the two properties and then allocating a portion of her value conclusions to each property.

Our review of the Tax Tribunal's decision is limited by Const 1963, art 6, § 28, which provides that, "[i]n the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Under this provision, we are bound by the Tax Tribunal's factual determinations and may properly consider only questions of law. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 388; 576 NW2d 667 (1998). Questions of law, including the proper interpretation and application of

a statute, are reviewed de novo. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). The Tax Tribunal commits an error of law when its decision is not supported by competent, material, and substantial evidence on the whole record. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 388. "Substantial evidence must be more than a scintilla of the evidence, although it may be substantially less than a preponderance of the evidence." *Id.* at 388-389.

Here, petitioner has failed to establish that the Tax Tribunal committed an error of law or adopted a wrong principle in rejecting its appraiser's proposed unitary approach to value. While the de novo nature of Tax Tribunal proceedings is such that the Tax Tribunal must make an independent determination of true cash value, *id.* at 409, the burden of proof rested with petitioner to establish the true cash value of the Lakecrest Shores property. MCL 205.737(3); *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 354-355; 483 NW2d 416 (1992); *Teledyne Continental Motors, Inc v Muskegon Twp*, 163 Mich App 188, 191; 413 NW2d 700 (1987).

"True cash value" means "the usual selling price at the place where the property to which the term is applied is at the time of assessment . . ." MCL 211.27(1). It is essentially the fair market value of property. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484 n 17; 473 NW2d 636 (1991). It is not necessary that every value-influencing factor be quantified in arriving at the usual selling price. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 399. A concept fundamental to the determination of true cash value is the highest and best use of the property. *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 633; 462 NW2d 325 (1990). This concept recognizes that "the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay." *Id.* It is a use that is "legally permissible, financially feasible, maximally productive, and physically possible." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 285; 730 NW2d 523 (2006).

Here, the record contains competent, material, and substantial evidence to support the Tax Tribunal's determination that the highest and best use of the Lakecrest Shores property was as the existing 58-unit apartment building. The evidence that petitioner chose to operate the 58-unit apartment building jointly with the Lakecrest Park property, and that a sale of either property would require a change in operations, does not establish that the Tax Tribunal erred in determining the highest and best use of the Lakecrest Shores property.

The doctrine of assemblage may be applied in some circumstances to determine the highest and best use of property. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 634-639; 705 NW2d 549 (2005). Assemblage is concerned with "the use of a parcel of property in conjunction with other properties." *Id.* at 634. But the general rule is that "different parcels of land in the same ownership are to be regarded as separate units for tax purposes and, as such, must be separately valued and assessed." *Edward Rose Bldg Co*, 436 Mich at 632. Further, unlike the Tax Tribunal's decision in *Fisher v West Bloomfield*

*Twp (On Rehearing)* MTT Docket Nos. 187567 and 210379, which was given precedential effect in the Tax Tribunal under MCL 205.765,<sup>1</sup> this case does not involve parcels of property that could not be conveyed separately under restrictive deed restrictions. The deed restriction was the basis of the Tax Tribunal's determination in *Fisher* that the highest and best use of two parcels of property was to consider them as a single valuation unit. It was only after making this determination that the Tax Tribunal applied assemblage valuation principles to find that the value of the water-frontage portion of the combined parcels enhanced the utility of the off-water main residential lot, and vice versa.

This case is also factually distinguishable from *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 411-413, which involved an integrated steel mill, and *Wayne Co v Michigan State Tax Comm*, 261 Mich App 174, 238-244; 682 NW2d 100 (2004), which involved integrated utility assets. In this case, evidence was presented that the Lakecrest Shores and Lakecrest Park properties could function and be sold separately. Petitioner's own appraiser, Shipman, conceded that the Lakecrest Shores property could be sold as a freestanding 58-unit apartment building. Although she did not know if all small apartment complexes have onsite leasing offices, the MPA's regional vice-president, Sophia Iglesias, indicated that she had prior experience in managing smaller apartment complexes offsite as part of a portfolio of properties. In addition, Shipman indicated that there is a larger pool of buyers for smaller apartment buildings and that "in real estate the tendency is . . . the lower the number of units the higher the price per unit, all else being equal." She opined that the difference between a 58-unit and a 302-unit apartment complex is significant enough to affect the price. Despite this testimony, Shipman did not value Lakecrest Shores as a 58-unit apartment building by itself under her sales-comparison approach, but rather adjusted sold properties used in her analysis to arrive at a value for a 302-unit apartment complex.<sup>2</sup> None of the sold properties used in the analysis was situated on noncontiguous parcels, and the price of the smallest of the four sold properties was adjusted downward to reflect that it had only 132 units. Further, Shipman did not formulate an income-capitalization approach to value based on the income stream that a potential buyer could expect if Lakecrest Shores is operated alone, and she did not consider any economies of scale available

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<sup>1</sup> MCL 205.765 is part of Chapter 6 of the Tax Tribunal Act, which established a residential property and small claims division. See MCL 205.761. Under MCL 205.765, "[a] decision of the division is not a precedent unless so designated by the tribunal." But this Court is not bound by a Tax Tribunal decision because it is an inferior tribunal. See *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004).

<sup>2</sup> Under a traditional sales-comparison approach, true cash value is determined "by analyzing recent sales of similar properties, comparing them with the subject property, and adjusting the sales price of the comparable properties to reflect differences between the two properties." *Meadowlanes Ltd Dividend Housing Ass'n*, 437 Mich at 485 n 19. It is the only approach that directly reflects the balance of supply and demand in the marketplace. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 391.

to a potential buyer from other business operations or the potential operation of the Lakecrest Park property.<sup>3</sup>

There is no doubt that petitioner purchased Lakecrest Shores at the same time it purchased Lakecrest Park, and operated the two properties as a single economic unit. But because there was also evidence that each property could function and be sold separately, and that each has features that would attract different pools of buyers, the Tax Tribunal did not commit an error of law or adopt a wrong principle by declining to apply a unitary approach to valuation. Although it was possible that petitioner could chose to sell the properties together, or that a prospective buyer would desire to make a single purchase without assigning value to each parcel, giving appropriate deference to the Tax Tribunal's assessment of Shipman's credibility and the reliability of her conclusions, *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 407, we cannot conclude that petitioner established the type of value-enhancing influences that would *require* the Tax Tribunal to apply a unitary approach. Its decision is supported by competent, material, and competent evidence on the whole record.<sup>4</sup>

We also reject petitioner's argument that the Tax Tribunal failed to consider the "existing use" and "present economic income of structures" factors in MCL 211.27(1) for determining true cash value. The latter factor requires consideration of actual income, although expenses may be considered as an element of net income. *Northwood Apartments v Royal Oak*, 98 Mich App 721, 727; 296 NW2d 639 (1980). While petitioner chose to maintain and present financial information for the two properties on a consolidated basis, the Tax Tribunal was neither bound by petitioner's action nor required to accept the consolidated information as adequate to evaluate the present economic income of the Lakecrest Shores property. Neither the Tax Tribunal's dissatisfaction with the adequacy of petitioner's evidence nor its rejection of Shipman's proposed unitary approach to value establishes that the tribunal failed to consider relevant factors affecting true cash value. The weight to be accorded the evidence was within the Tax Tribunal's discretion. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 404.

We also reject petitioner's various claims directed at showing that Shipman provided a credible appraisal. While the Tax Tribunal "may give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs," the rules of evidence shall be followed as far as practical in a contested case before the Tax Tribunal. MCL

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<sup>3</sup> Under a traditional income-capitalization approach to value, the present value of the future benefits of property ownership is measured by "estimating the property's income stream and its resale value (reversionary interests) and then developing a capitalization rate which is used to convert the estimated future benefits into a present lump-sum value." *Meadowlanes Ltd Dividend Housing Ass'n*, 437 Mich at 485 n 20.

<sup>4</sup> For the reasons stated in *Roosevelt Park*, we reject petitioner's argument that the Tax Tribunal's finding that its appraisal was for property "that did not exist for the tax years at issue" is not supported by substantial, competent, and material evidence. *New Michigan LP*, slip op at 5 n 3.

24.275; see also *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 246; 377 NW2d 309 (1985), MCL 205.726, and MCL 205.746(1). In general, every aspect of an expert's analysis, including the underlying data and the manner in which it is interpreted, must be reliable. MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). Giving due deference to the Tax Tribunal's assessment of Shipman's lack of credibility and the unreliability of her conclusions, petitioner has not shown that the Tax Tribunal committed an error of law or adopted a wrong principle in finding that Shipman's appraisal lacked credibility or was based on unreliable conclusions.

Petitioner also argues that the Tax Tribunal erred by relying on a cost approach to determine the true cash value of the Lakecrest Shores property. Petitioner asserts that the income-capitalization approach is appropriate for valuing income-producing property. Absent evidence of comparable sales, the income-capitalization approach is generally considered the most accurate method for valuing income-producing property. *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 476; 302 NW2d 164 (1981) (LEVIN, J., concurring). It is also been said that cost approach has little bearing on the market if buyers and sellers would not consider the cost to build as an alternative to buying an existing facility on property. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 402.

Here, the Tax Tribunal found that petitioner's evidence lacked sufficient reliability to determine a value for the 58-unit apartment building in Lakecrest Shores under the income-capitalization or sales-comparison approach. It applied the cost approach only as a last resort and after determining that it could consider some of the comparable sales information in petitioner's appraisal to measure the accuracy of the cost approach. The Tax Tribunal did not act inconsistently by considering sales information to support respondent's value conclusion under the cost approach, while at the same time rejecting Shipman's sales-comparison approach. Although it is apparent that the Tax Tribunal did not believe that it could reliably adjust the larger comparable sale properties used by Shipman to arrive at a reliable valuation for the smaller 58-unit apartment building at Lakecrest Shores, the sales information could still reasonably be viewed as having some probative value in evaluating the accuracy of respondent's cost approach to value. While not conclusive evidence, a sales price of similar properties is relevant evidence, *Samonek v Norvell Twp*, 208 Mich App 80, 85; 527 NW2d 24 (1994); *Jones & Laughlin Steel Corp*, 193 Mich App at 354, so it may appropriately be considered by the Tax Tribunal in determining the most accurate valuation under the circumstances, *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 405.

Giving appropriate deference to the Tax Tribunal's finding that neither party presented sufficiently reliable evidence for it to apply the income-capitalization or the sales-comparison approach, the tribunal did not commit an error of law or adopt a wrong principle by looking to the cost approach, and using some comparable sales information to evaluate the accuracy of the cost approach to determine the value of the Lakecrest Shores property. To the extent respondent argues that the Tax Tribunal used the unadjusted sales price per unit in Shipman's sales-comparisons approach as part of its analysis, the Tax Tribunal specified that it considered

Shipman's adjustments, with the exception of the downward adjustments that she made for property size and economic characteristics. We are not persuaded that the Tax Tribunal inaccurately evaluated the sales information when adjusted in this manner.<sup>5</sup>

While there is merit to petitioner's claim that respondent's witness, Daniel VanderKooi, did not prepare the cost approach reflected in respondent's property tax records, the Tax Tribunal may give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in their affairs. MCL 24.275; MCL 205.746(1).<sup>6</sup> In addition, the burden of proof on petitioner encompassed both a burden of persuasion, which does not shift during the course of a hearing, and the burden of going forward with evidence, which may shift to the opposing party. *Jones & Laughlin Steel Corp*, 193 Mich App at 354-355.

At the same time, the Tax Tribunal found that petitioner did not provide any evidentiary basis for finding that the factors used to determine the value of Lakecrest Shores under respondent's cost approach were inaccurate. Indeed, the record establishes that petitioner chose not to offer any proposed value under the cost approach. While petitioner was still free to challenge the credibility or reliability of respondent's evidence, because petitioner had the burden of proof and offered no evidence to contradict the value established by respondent under the cost approach, the Tax Tribunal did not commit an error of law or adopt a wrong legal principle by accepting respondent's proposed value under a cost approach for each tax year.

Finally, we reject petitioner's argument that the Tax Tribunal failed to satisfy its duty to make an independent determination of true cash value. The Tax Tribunal did not simply adopt respondent's assessments for each year. As indicated previously, it was only after the Tax Tribunal found each party's evidence too unreliable for it to apply the income-capitalization approach or sales-comparison approach, and after it evaluated the accuracy of respondent's proposed cost approach to value, that it accepted the true cash value contained in the property tax records. Under the circumstances, the Tax Tribunal's approach was sufficient to satisfy its duty to make an independent determination of true cash value. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 409-410.

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<sup>5</sup> We also reject petitioner's claim that Shipman made appropriate adjustments for economic characteristics when preparing the sales-comparison approach. As indicated previously, the credibility and reliability of Shipman's proposed adjustments were matters for the Tax Tribunal to decide. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 407.

<sup>6</sup> The Tax Tribunal's opinion reflects that it was aware that VanderKooi did not prepare the cost approach, but rather explained at the evidentiary hearing how the county performed the assessment function for respondent, using computer software that follows the State Tax Commission Cost Manual, to compute cost-based assessments for property.

Affirmed.

/s/ William B. Murphy  
/s/ William C. Whitbeck  
/s/ Christopher M. Murray